

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KAREN WATSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 217,357
<b>SPIEGEL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>HARTFORD ACCIDENT &amp; INDEMNITY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant, respondent and respondent's insurance carrier appealed the Award dated March 5, 1999 entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on August 13, 1999.

**APPEARANCES**

Kelly W. Johnston of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the parties stipulated claimant's average weekly additional compensation was \$70.84 which, when combined with the average weekly base wage and overtime of \$309.38, results in a gross average weekly wage of \$380.22 beginning January 1, 1999. For the period ending December 31, 1998, claimant's average weekly wage was \$309.38.

**ISSUES**

Claimant suffered repetitive use injuries to both upper extremities. Judge Clark found claimant had suffered a 32 percent impairment of function as a result of her work related injury, but because she had not made a good faith effort to return to work her claim for a higher work disability award was denied.

On appeal, claimant argues that she is entitled to a work disability award. Conversely, respondent contends that claimant should be limited to an award based upon her percentage of functional impairment only but that the functional impairment should be less than that found by the ALJ and, in addition, there should be an offset for the percentage of functional impairment found to be preexisting. The nature and extent of claimant's disability is the only issue on appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the entire record, the Appeals Board finds that the ALJ's Award should be modified to a work disability. The Award should also be modified to take into consideration the increase in gross average weekly wage when the additional compensation benefits paid by respondent ended.

The Appeals Board disagrees with the finding by the ALJ that claimant failed to make a good faith effort to return to work for respondent. Claimant made several attempts to perform the accommodated work respondent offered to her but, because of her work injuries coupled with her other health problems, she was unable to perform those jobs.<sup>1</sup> Even though respondent was willing to accommodate claimant within the restrictions recommended by Dr. Tyrone D. Artz, those restrictions did not take into consideration claimant's other health problems, and, in addition, when Dr. Artz approved the job description respondent provided him, he was not fully cognizant of all of the various functions that job entailed. Nevertheless, claimant was capable of engaging in substantial, gainful employment but failed to make a good faith effort to find other suitable work. Therefore, a post-injury wage should be imputed based upon claimant's wage earning ability.<sup>2</sup>

Based upon the testimony of vocational experts James Molski and Karen Terrill, claimant's post-injury wage earning ability would be at or near the federal minimum wage. The Appeals Board finds claimant retains the ability to earn approximately \$5.50 per hour or \$220 per week. When this is compared to her average weekly wage of \$309.38, claimant's wage loss is 29 percent. Beginning January 1, 1999, claimant's average weekly wage became \$380.22 and, therefore, her wage loss becomes 42 percent. The Appeals Board finds the task loss opinion given by Dr. John W. Ellis to be the most credible. In his opinion, claimant retains the ability to perform 5 of the 20 tasks identified for a task loss of 75 percent. Averaging the wage loss with the task loss as required<sup>3</sup> yields a work disability

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<sup>1</sup> See, Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>3</sup> K.S.A. 44-510e.

of 52 percent for the period ending December 31, 1998. Beginning January 1, 1999 claimant's work disability is 58.5 percent.

The ALJ adopted the 32 percent functional impairment rating given by Dr. Artz. No offset was applied because this 32 percent rating did not include any of claimant's prior problems. Unlike the functional impairment rating, however, these work disability percentages should be reduced by the percentage of functional impairment that preexisted because they are inclusive of the preexisting conditions.<sup>4</sup> But what that percentage would be under the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, has not been proven. Therefore, no reduction for preexisting impairment can be given.

The findings and conclusions enumerated in the Award by the ALJ are otherwise adopted and affirmed by the Appeals Board to the extent they are not inconsistent with the above findings and conclusions.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated March 5, 1999, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Karen Watson, and against the respondent, Spiegel, Inc., and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred March 5, 1996. Claimant is entitled to 69.81 weeks of temporary total disability at the rate of \$206.26, or \$14,399.01. For the period ending December 31, 1998, she is entitled to 77.48 weeks at the rate of \$206.26, or \$15,981.02, for a 52% permanent partial disability. For the period thereafter, she is entitled to 133.23 weeks at the rate of \$253.49, or \$33,772.47, for a 58.5% permanent partial disability, making a total award of \$64,152.50.

As of March 24, 2000, there is due and owing claimant 69.81 weeks of temporary total disability compensation and 141.62 weeks of permanent partial compensation for a total of \$46,638.88, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$17,513.62 is to be paid for 69.09 weeks at the rate of \$253.49 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

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<sup>4</sup> K.S.A. 44-501(c).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER**DISSENT**

I disagree with the majority's award only to the extent it includes the amount of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides, inter alia, that:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered from preexisting conditions and even had prior surgeries to her upper extremities for bilateral carpal tunnel syndrome. That claimant had some preexisting functional impairment is clear. What is not clear is how much of claimant's current disability is as a result of her series of accidents, ending March 5, 1996, and how much preexisted. I agree with the majority that the record fails to establish the percentage of preexisting functional impairment, but I disagree with whose burden of proof it is. Claimant bears the burden of proving the nature and extent of her disability. This burden includes proving how much of her present impairment and disability is from this work-related accident.

K.S.A. 44-501(a) clearly places the burden of proof on the claimant to prove all of the various conditions upon which her entitlement to compensation depends. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

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BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS  
Vincent A. Burnett, Wichita, KS

**KAREN WATSON**

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**DOCKET NO. 217,357**

John D. Clark, Administrative Law Judge  
Philip S. Harness, Director